ARGUMENT.

For the first time in this case the argument has been made that unless the Pennsylvania Act is sustained the private school systems will close or vastly curtail their operations and that this will throw an impossible tax burden on the public. The Attorney General of Pennsylvania, on behalf of the state officials, does not make this argument; but it is made by the appellee schools and in the brief of the appellee Pennsylvania Association of Independent Schools and is, of course, found in almost all of the *amicus* briefs on behalf of the appellees.

This contention was prominent in the debates on the bill in the legislature, but until the filing of these briefs, it had not been previously made as a legal argument. It was not, therefore, referred to in appellants' brief.

The argument is not, in a proper sense, a legal argument, in that it does not purport to demonstrate the constitutionality of Act 109 on the basis of theory, precedent or logic or, in short on any legal basis. There is no doctrine known to constitutional law holding that otherwise unconstitutional legislation is constitutional if the cost of accomplishing the desired end by constitutional means would be far more expensive. Had *economy* or *efficiency* been a criteria of the founding fathers, they would never have established three independent branches of government or, for that matter, trial by jury or the right to counsel. Due process is costly.

Furthermore, it is difficult to see how this new argument can be squared with appellee's basic contention that the principal benefits of the legislation flow to the *children,* not to the institutions actually receiving the money. If this is so how will the nonpublic schools be saved by Act 109? Likewise the value-received argument,—that the state receives a *quid pro quo* and the schools give as much as they get must be considered gravely impaired. With the emergence

of this argument the issue is at least now divested of the window-dressing provided by the form and language of the Act and stands squarely before the court: the primary purpose and effect of Act 109 is to aid the parochial schools in order to prevent them from closing.

But this proposition, aside from its non-legal nature, makes more problems than it solves, particularly since we are before the Court on review of a threshold dismissal on Motion to Dismiss.

For the argument is a (dire) prediction based upon at least four assumptions of *fact:*

1. That the nonpublic school system is in serious financial straits and shrinking.

2. That the traditional support sources for nonpublic schools have reached the limit of their financial capabilities.

3. That without substantial state aid they will virtually disappear.

4. That the taxpayer will be unable to bear the costs of educating the children now in the nonpublic schools.

None of these facts are of record.

Furthermore, there are a number of other facts which tend to modify and even contradict the above four assumptions. For example, governmental statistics examined by appellants do not show any significant decrease in Catholic parochial school enrollment[1] not paralleled by decreases in public school enrollment. (It must be remembered that all school population is now commencing to decline and will continue to do so for the next decade as a result of a lower-

1. These statistics are consistent with press reports (Inquirer, September 22, 1970), of no decrease in enrollment in the five-county area schools of the Philadelphia Archdiocese, for year 1970-71.

Decline in the number of *schools* as opposed to enrollment is often cited, but it is appellants' information that most of this is due to a wise policy of consolidation.

ing of the birth rate in recent years.) Furthermore, it appears that all *other* non-public schools, both church-related and nonchurch-affiliated schools are *increasing* their enrollments. The two Jewish appellee schools joined in the brief in which this argument is made; but again, although nothing is of record, appellants' information is, and it is believed to be common knowledge, that there has been a general marked increase in enrollment in the Jewish parochial schools in the last decade. The Montgomery Christian Day School also joined, but that school is typical of independent fundamentalist and bible-oriented elementary schools springing up in a number of communities. Friends (Quakers) schools ended the decade of the sixties with an increase in enrollment of about 35%.[2] The Germantown Lutheran Academy also joined in this brief and this argument and, with itself having been founded but approximately five years ago, it is an example of the increase in the number of Lutheran (Missouri Synod) schools. As for nonchurch-affiliated schools, the last decade has seen their increase in areas where until recent years they were relatively rare, i.e., the Midwest and the West Coast, to say nothing of the great proliferation of private schools in the formerly de jure segregated states of the South.

At least the first assumption, that the nonpublic schools are already so financially pressed so as to have had to measurably curtail their educational efforts, must be pleaded as a fact and proved as a fact by appellees if they intend (over appellants' objection) to rely upon it, and this argument now having been made, appellants cannot be denied extensive discovery thereon.

As to the second assumption of the argument, that the

---

2. DOC. OE-20111, Office of Education, Dept. H. E. W., U. S. Gov't Printing Office, Cat. FS 5-220:20111, (1968) (Table A), supplemented by verbal report from personnel at the Philadelphia Yearly Meeting.

resources of the groups supporting these nonpublic schools are strained to the utmost, there is nothing of record to sustain this and no reason to believe from general observation that there is any foundation for this whatsoever.

Appellants would surely also be entitled to discovery on this point. As an example of the kind of embroilment of the state in religious affairs which will result from Act 109, dissenting Judge Hastie in the court below pointed to the probing interrogatories already of record (stayed) as to the workings of the parochial schools. Discovery on this second assumption would necessarily be even more intimate and would surely require a complete financial disclosure by the various archdioceses in Pennsylvania if the schools intend to rely on financial distress as a reason for sustaining Act 109.

The third assumption, that, based on the preceding two, the nonpublic school system will shrivel to insignificance, is also not of record and not credible. It requires the assumption that deeply held beliefs and policies, some going back for many hundreds of years, for which many individual and group sacrifices have been made and battles fought, will be abandoned, because of financial strain, by groups which are now more affluent than they have ever been.

Finally, there is no evidence whatsoever for the proposition that the state cannot afford to educate all of its children. Indeed, the proposition is monstrous. Several states do not rely to any significant degree upon nonpublic schools. The figures are as follows: Utah educates 97.9% of its children in public schools; North Carolina 98.5%; Arkansas 98.3% and Alaska 97.2%. In addition, at least until 1966, Alabama, South Carolina, Georgia and Mississippi educated an average of 98% of their children in public schools. A notoriously poor state such as West

Virginia, according to 1968 figures, educated 96.3% of its children in the public schools.[3] One would need support of some kind of evidence for the proposition that that which is done in fact by a score of states is beyond the capacity of other and generally richer states with higher median and average income levels.

Appellants repeat that they do not believe that the Court can give legal credence to the economic argument. It has, however, been thrown into the scale by the appellee schools and since it is entirely based on factual assertions, surely appellants are entitled to discovery and a record, and appellees should be required to prove with competent evidence what they assert.

Respectfully submitted,

HENRY W. SAWYER, III,
Attorney for Appellants.

DRINKER BIDDLE & REATH,
Of Counsel.

---

3. DOC. OE-20111, Office of Education, Dept. H. E. W., U. S. Gov't Printing Office, Cat. FS 5-220:20111, (1968).